AUG 15 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,
Petitioner,

vs.

GENE SLAGLE, INC., ET AL.
and
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID L. PEMBERTON
MULDOON, PEMBERTON & FERRIS
50 West Broad Street
Columbus, Ohio 43215
Attorneys for Respondents
Gene Slagle, Inc., et al.

GEORGE E. SHERTZER
WALTER POND
One Stamford Forum
Stamford, Connecticut 06904

JOHN ROBERT JONES
ANDREW T. JONES
POWER, JONES & SCHNEIDER
100 East Broad Street
Columbus, Ohio 43215
Attorneys for Petitioner
General Telephone Company of Ohio

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio

INDEX

	Page
STATEMENT OF THE CASE	1
QUESTION PRESENTED	3
ARGUMENT	4
I. Petitioner Has Not Been Deprived Of Any Right, Privilege, Or Immunity Guaranteed By The Constitution Of The United States	4
II. The Alleged Federal Question Was Not Timely Raised	7
CONCLUSION	8
CERTIFICATE OF SERVICE	9
APPENDIX	10

TABLE OF AUTHORITIES

Page

Cases:

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) ---- 7

Cleveland Electric Illuminating Co. v. Pub. Util. Comm., 42 Ohio St. 2d 403 (1975) ---- 6

Ellis v. Dixon, 349 U.S. 458, 99 L. Ed. 1231, rehearing denied 350 U.S. 855, 100 L. Ed. 759 (1955) 8

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 88 L. Ed. 333 (1944) ---- 6

Gene Slagle, Inc. v. Pub. Util. Comm., 41 Ohio St. 2d 44, 322 N.E. 2d 640 (1975) ---- 3, 5

General Telephone Co. v. Pub. Util. Comm., 30 Ohio St. 2d 271, 285 N.E. 2d 34 (1972) ---- 2, 4, 6

Portsmouth v. Pub. Util. Comm., 108 Ohio St. 272 (1923) ---- 6

Statutes:

R.C. 4905.22 ---- 1, 10

R.C. 4909.17 ---- 1, 10

R.C. 4903.09 ---- 1, 11

R.C. 4903.13 ---- 5, 11

R.C. 4909.15 ---- 6, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,
Petitioner,

vs.

GENE SLAGLE, INC., ET AL.
and
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE[1]

The Ohio statutes require a public utility such as petitioner to obtain an order of the Public Utilities Commission of Ohio (PUCO) before charging and collecting increased rates. Ohio Revised Code Sections 4905.22 and 4909.17, among others. The Ohio statutes also require that such an order be issued in accordance with specific and mandatory guidelines, including the requirement that the PUCO set forth the reasons prompting its decision. Ohio Revised Code Section 4903.09.

On August 17, 1971, petitioner obtained a PUCO order authorizing petitioner to increase its rates. However, petitioner was not satisfied with the amount of the rate increase and, on November 10, 1971, appealed to

[1] Since respondents are dissatisfied with petitioner's statement of the case and with petitioner's statement of the question presented for review, respondents will restate these specifications of Rule 40 in their brief.

the Ohio Supreme Court alleging that the rate of return afforded by the PUCO in its August 17, 1971 order was inadequate.

On June 21, 1972, in attempting to review petitioner's allegations of error, the Ohio Supreme Court found that the PUCO's August 17, 1971 order was itself unlawful in that it failed to comply with the mandatory provisions of Section 4903.09. The Court, therefore, reversed and set aside said order and remanded the cause to the PUCO with instructions to comply with that statute. In so doing, the Court said, "The record being incomplete, no decision as to the reasonableness of the determined rate of return can be made." *General Telephone Co. v. Pub. Util. Comm.*, 30 Ohio St. 2d 271, 285 N.E. 2d 34 (1972); Pages 1a to 9a of petitioner's Appendix.

On September 5, 1973, respondents filed a complaint against petitioner alleging that petitioner had violated the express provisions of the Ohio statute by continuing to charge and collect rates established by petitioner pursuant to the PUCO's August 17, 1971 order subsequent to the Ohio Supreme Court's reversal of said order in *General Telephone Co. v. Pub. Util. Comm., supra.* Respondents' complaint was dismissed by the PUCO on January 10, 1974, whereupon respondents appealed to the Ohio Supreme Court.

On January 29, 1975, the Ohio Supreme Court held, in a *per curiam* decision, that since the August 17, 1971 rate order was "clearly unlawful," petitioner should not have continued to collect the rates established thereunder but should have reverted to its prior rates until further order of the PUCO. In its January 29, 1975 decision, the Court emphasized that in *General Telephone Co. v. Pub. Util. Comm., supra,* the Court had "specifically withheld consideration of the reasonableness of the

rate ordered, placing the reversal upon the sole ground of a failure by the commission to observe the requirements of R.C. 4903.09." *Gene Slagle, Inc. v. Pub. Util. Comm.*, 41 Ohio St. 2d 44, 322 N.E. 2d 640 (1975); Pages 38a to 42a of petitioner's Appendix.

On April 17, 1975, petitioner's motion for rehearing was denied by the Ohio Supreme Court; and on July 15, 1975, petitioner filed the subject petition claiming jurisdiction under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

As viewed by petitioner, the question presented is whether petitioner has been deprived of its property without due process of law in violation of the Fourteenth Amendment to the United States Constitution as a result of the Ohio Supreme Court's decision. However, in order to reach the question posed by petitioner, this Court must assume facts which simply do not exist in the instant case; and this Court must also ignore the fact that, even assuming *arguendo* petitioner's facts, petitioner's constitutional objections were not timely raised.

Respondents submit that, contrary to petitioner's assertions, the question presented to this Court for review is a state, not a federal, question and that the question presented is simply whether, under the Ohio law, a public utility may continue to charge and collect rates established pursuant to an order of a state public utilities commission where the order has been reversed and set aside as unlawful by a competent court and where the order is required by state statute as a condition to charging the rates.

ARGUMENT

I.

Petitioner Has Not Been Deprived Of Any Right, Privilege, Or Immunity Guaranteed By The Constitution Of The United States

In order to invoke the jurisdiction of this Court under the circumstances herein presented, petitioner must establish that the Ohio court has decided a federal question not heretofore determined by this Court or has decided such a question in a way not in accord with applicable decisions of this Court. Moreover, it is fundamental that the alledged federal question must arise from the facts which are actually operative and established in the cause and not from the whim, imagination, or fancy of the petitioner.

In the instant case, petitioner's alleged federal question includes three premises which are not supported by the facts herein. First, petitioner asserts that in *General Telephone Co. v. Pub. Util. Comm., supra,* in which the Ohio Supreme Court reversed and set aside the PUCO's August 17, 1971 rate order, petitioner was "successful" on appeal. Second, petitioner asserts that since petitioner was "successful" on appeal, the Ohio Supreme Court's subsequent decision that petitioner should not have collected the rate increase until a further PUCO order issued constitutes a penalty which deprives petitioner and other Ohio utilities of their constitutional right of appeal. Third, petitioner asserts that the Ohio Supreme Court's decision requires it to revert to constitutionally confiscatory rates. None of these assertions are correct.

First, in prosecuting its appeal in *General Telephone Co. v. Pub. Util. Comm., supra,* petitioner alleged and argued that the rate of return afforded by the PUCO's August 17, 1971 order was inadequate. The Ohio Supreme Court, however, did not, in fact, could not, reach

this issue and reversed on other grounds. The Ohio Supreme Court did not concur with petitioner, therefore, that the rate of return was inadequate. Instead, the Ohio court found the entire rate order invalid under the Ohio statute and set the entire order aside, including those portions granting petitioner any increase in rates. In so doing, the Ohio court "specifically withheld consideration of the reasonableness of the rate ordered," as it was required to do under the Ohio law, and specifically refrained, therefore, from concurring with any of the petitioner's representations concerning the inadequacy of the rate of return found by the PUCO. *Gene Slagle, Inc. v. Pub. Util. Comm., supra.*

Second, the Ohio Supreme Court's decision that petitioner should not have collected the rate increase afforded by the August 17, 1971 order until further order of the PUCO does not constitute a penalty to petitioner or a deterrent to other Ohio utilities to appeal. Ohio Revised Code Section 4903.13 vests jurisdiction in the Ohio Supreme Court to review PUCO rate orders. That section, a copy of which is included in respondents' appendix, gives the Ohio court broad discretion to affirm, reverse, vacate, *or modify* such orders. In an appropriate case, therefore, i.e., where the order itself meets the minimum requirements for judicial review, a truly successful utility-appellant need have no fear concerning the loss of a lawfully established rate increase.[2] Neither

---

[2] In this regard, this Court's attention is called to the fact that on June 11, 1975, more than a month prior to the filing of the petition herein, the Ohio Supreme Court issued a decision affirming in part and reversing in part a PUCO rate order at the behest of an Ohio utility and subsequently enjoined the PUCO from prohibiting the utility from filing interim rate schedules to preserve the increase afforded by said order on the strength of the Court's holding in this case. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403 (1975). In so doing, respondents submit, the Ohio Supreme Court acted consistently with its decision in this case wherein, in distinguishing other cases from its decision in *General Telephone Co. v. Pub. Util. Comm., supra*, the Court emphasized that consideration of the reasonableness of the rate had been specifically withheld.

does that section or any other provision of the Ohio law attach any condition or penalty to a utility's exercise of its right to judicial review.

As to the effect on petitioner of the Ohio court's exercise of its statutory review powers in the instant case, it is sufficient to note that since the Ohio court initially found the PUCO's rate order statutorily deficient and, therefore, invalid, its subsequent finding that petitioner was not entitled to collect the increase afforded thereby deprived petitioner of nothing to which it was entitled under the Ohio law.

Third, there is absolutely no evidence in the instant case to support petitioner's repeated assertions that its prior rates were or are confiscatory; and respondents strongly object to petitioner's repeated representations to the effect that the confiscatory character of such rates is "undisputed."

Petitioner's entire basis for asserting that its prior rates were confiscatory is the PUCO's August 17, 1971 finding that said rates were "insufficient" to yield "adequate" compensation. This finding, it must be noted, was contained in the very same rate order which the Ohio court set aside as unlawful. It should also be noted that this finding is a condition precedent under the Ohio statute to the PUCO's awarding any public utility a rate increase. Ohio Revised Code Section 4909.15. The finding itself, therefore, is entitled to little, if any, consideration. Morever, it has long been recognized, under both Ohio and federal law, that a rate which is insufficient or even unreasonable is not necessarily confiscatory in a constitutional sense. Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L. Ed. 333 (1944), and *Portsmouth v. Pub. Util. Comm.*, 108 Ohio St. 272 (1923).

When careful consideration is given to the assumptions contained in petitioner's statement of the question presented to this Court for review, it is apparent that petitioner has seriously taxed its credibility to avoid the obvious conclusion that the Ohio Supreme Court's decision raises neither of the constitutional issues presented by the petition but is premised entirely upon state law. Consequently, respondents will not burden this Court by individually distinguishing the ases cited in support of the petition except to note that those cases presented far different facts and circumstances than does the instant case.

II.

The Alleged Federal Question Was Not Timely Raised

At Page 4 of the petition, petitioner states: "Since this decision represented a new and unanticipated construction of state law *conflicting with previous decisions* of the Court below, petitioner filed a motion for rehearing on the grounds that its decision reinstated confiscatory rates in violation of the Fifth and Fourteenth Amendments of the United States Constitution (App. 49a) and deprived petitioner of procedural due process in that it rendered illusory a utility's right of appeal. (App. 50a) The federal constitutional issue was thus timely raised. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930)." (Emphasis added)

Apparently in recognition that in the *Brinkerhoff-Faris Trust* case, *supra,* this Court relied heavily upon the state court's change in its prior construction of state law in finding that the alleged federal question had been

timely raised, even though not raised until subsequent to the state court's decision, petitioner alleges that the Ohio court's decision herein represents a conflict with its previous decisions. This is simply not so, however; and it is noteworthy that the petition contains not a single citation to a single decision of the Ohio Supreme Court or of any other Ohio court which conflicts with the interpretation of Ohio law set forth in the decision herein.

The Ohio Supreme Court's *per curiam* holding in the instant case recites almost verbatim the proposition of law urged in the respondents' notice of appeal to the Ohio court and which was extensively briefed and argued by all parties long before the Court's January 29, 1975 decision. Yet, neither of the alleged constitutional issues now attempted to be raised by petitioner was ever presented to the Ohio court prior to the issuance of the Ohio court's decision. Under such circumstances, respondents submit, the situation presented in *Ellis v. Dixon*, 349 U.S. 458, 99 L. Ed. 1231, rehearing denied 350 U.S. 855, 100 L. Ed. 759 (1955), among others, is more characteristic of petitioner's posture before this Court in this case.

CONCLUSION

An examination of the facts presented to this Court in the instant case as opposed to the petitioner's unsupported assumptions clearly supports the conclusion that the petitioner has not been deprived of any right, privilege, or immunity guaranteed by the United States Constitution and, in particular, by the due process clause of the Fourteenth Amendment thereto and that, conse-

quently, the petition should be denied. The petition should also be denied, respondents submit, since the alleged federal question was not timely raised.

Respectfully submitted,

DAVID L. PEMBERTON
MULDOON, PEMBERTON & FERRIS
50 West Broad Street
Columbus, Ohio 43215
Attorneys for Respondents
Gene Slagle, Inc., et al.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief In Opposition To Petition For Writ of Certiorari were sent by United States first class mail, postage prepaid, to counsel representing the parties to this proceeding this 14th day of August, 1975.

DAVID L. PEMBERTON

APPENDIX

Ohio Revised Code Sections Cited

§ 4905.22 Service and facilities required; unreasonable charge prohibited. (GC §§ 614-12, 614-13)

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service or in excess of that allowed by law or by order of the commission.

§ 4909.17 Application for change in rate; approval. (GC § 614-20)

No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18 and 4909.19 of the Revised Code. Such sections do not apply to any rate, joint rate, toll classification, charge, or rental, or any regulation or practice affecting the same, or railroads, street and electric railways, motor transportation companies, telegraph companies, and pipe line companies. Any change of any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of telegraph

companies, may be made in the same manner as such changes may be made by railroad companies. All laws respecting such changes by railroad companies apply to such changes by telegraph companies.

§ 4903.09 Written opinions filed by commission in all contested cases. (GC § 614-46a)

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

§ 4903.13 Reversal of final order; notice of appeal. (GC §§ 544, 545)

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

§ 4909.15 Fixation of reasonable rate. (GC § 614-23)

When the public utilities commission is of the opinion, after hearing, that any rate, fare, charge, toll, rental,

schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall, with due regard among other things, to the value of all property of the public utility actually used and useful for the convenience of the public, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and with due regard to all such other matters as are proper, according to the facts in each case, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service, shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any

BLEED TH

other, rate, fare, toll, charge, rental, classification, or service is prohibited.

Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-90

GENERAL TELEPHONE COMPANY OF OHIO,
Petitioner,

v.

GENE SLAGLE, INC.,
and
THE PUBLIC UTILITIES COMMISSION OF OHIO,
Respondents.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Now comes the Public Utilities Commission of Ohio (Respondent Commission) by its Counsel William J. Brown, Attorney General of Ohio, and supports the Petition of the General Telephone Company of Ohio (Petitioner) for a writ of certiorari to review the judgment of the Supreme Court of the State of Ohio in the case of *Gene Slagle, Inc. v. Pub. Util. Comm.* (1975) 41 Ohio St. 2d 44. Since Respondent Commission supports the petition it is filing this Brief pursuant to U.S. Sup. Ct. Rule 21 (4), 28 U.S.C. This filing has been made as promptly as possible as required by said rule. The Statement of the Case outlining the procedural history of this matter as presented by Petitioner is acceptable to Respondent Commission.

REASONS FOR GRANTING THE WRIT

Respondent Commission believes that the Opinion of the Supreme Court of Ohio in *Gene Slagle, Inc., supra,* has such a significant impact on utility regulation, that it would certainly be appropriate for this Court to review that Opinion.

The present state of law in Ohio, since the Ohio Supreme Court's decision in *Gene Slagle, Inc., supra,* is such that Ohio's public utilities may well be faced with a serious dilemma when deciding whether to appeal a rate order of the Respondent Commission, which order granted only a portion of the rate relief sought by the public utility. If the appeal is taken and the public utility is successful on appeal, under *Gene Slagle, Inc., supra,* "those rates in effect prior to the (appealed) order (are) reinstated by operation of law, and (continue) in effect until further order of the (Respondent Commission)". If the appeal is not taken, the public utility is constrained to accept a rate increase which it may believe to be insufficient and which the Supreme Court of Ohio might find to be unlawful.

The issues raised by the Petition do seem to be of a substantial Federal nature. The Supreme Court of the State of Ohio's decision in *Gene Slagle, Inc., supra,* draws into question an Ohio public utility's right to due process under the Fourteenth Amendment of the United States Constitution. Whether that decision would be applicable in jurisdictions other than Ohio, Respondent Commission cannot say. However, future decisions of the Supreme Court of the State of Ohio on appeals from rate orders of Respondent Commission will be subject to the effect of the decision in *Gene Slagle, Inc., supra.* Because this decision will have continuing effect at least within Ohio and because the effect could be con-

stitutionally infirm Respondent Commission believes that the Petition should be granted.

Although Respondent Commission would normally welcome a ruling of the Supreme Court of Ohio which might have the effect of finalizing rate orders of Respondent Commission by making appeals by the public utility involved less likely, it does not believe that such finalizing should come at the expense of even potential infringement of constitutionally protected rights. It is for this reason that Respondent Commission fully supports Petitioner's efforts to obtain review of the decision of the Supreme Court of Ohio to determine whether that decision is constitutionally infirm.

Respondent Commission has not, in this Brief, addressed the merits of issues raised by Petitioner. Rather, this Brief is limited to reasons why Respondent Commission believes this Court should grant the Petition before it. Should this Court grant the Petition and review the decision of the Supreme Court of the State of Ohio, Respondent Commission will fully participate and will at that time address itself to the merits of the case.

CONCLUSION

Respondent Commission supports the Petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Ohio in the case of *Gene Slagle, Inc. v. Pub. Util. Comm.* (1975) 41 Ohio St. 2d 44 and respectfully urges this Court to grant such Petition.

Respectfully submited,

WILLIAM J. BROWN
Attorney General of Ohio
CHARLES S. RAWLINGS
Assistant Attorney General
Chief, Public Utilities Section
MARVIN I. RESNIK
Assistant Attorney General
Public Utilities Section
111 North High Street
Columbus, Ohio 43215
(614) 466-4395
Attorneys for Respondent
Public Utilities Commission
of Ohio